

MARINE STEWARDSHIP COUNCIL

INDEPENDENT ADJUDICATION

IN THE MATTER OF

SOUTH AFRICAN HAKE TRAWL

DECISION OF THE INDEPENDENT ADJUDICATOR PURSUANT TO FCR PD 2.4

1. By Notice of Objection deemed to be dated 11 December 2020 the Wildlands Conservation Trust (hereafter “the Trust” or “the Objector”) has submitted an Objection to the report and recommendation of Lloyd’s Register, the Conformity Assessment Body (hereafter the “CAB”) to certify the “South African Hake Trawl” (hereafter shortened to “SAHT” or the “Fishery” for convenience). The Trust objects to the proposed certification.
2. The fishery client is the South African Deep-Sea Trawling Industry Association (hereafter “SADSTIA” or the “Fishery Client”) – Section 10 of the CAB’s report sets out who they are. The CAB has produced a lengthy report following its assessment of the fishery, which runs to 516 pages. I have read it carefully. The assessment was carried out pursuant to FCP version 2.1, and the Fisheries Standard applicable is version 2.01.
3. The Notice of Objection is 23 pages long. It contains thirteen grounds of objection. These are, in summary:

- a. A procedural ground of objection pursuant to PD 2.8.2.a that there was a serious procedural irregularity because the Trust was not “alerted” to the re-assessment of the Fishery which had a material effect on the CAB’s determination.
 - b. Three grounds of objection pursuant to PD 2.8.2.b that the conditions applied to PIs 2.3.1, 2.3.2 and 2.3.3 on ETP species were arbitrary or unreasonable.
 - c. Eight grounds of objection to scoring decisions related to PIs 2.1.1, 2.1.2, 2.1.3, 2.2.2, 2.2.3, 2.3.1, 2.3.2 and 2.3.3.
 - d. One ground of objection pursuant to PD 2.8.3 on the basis of information not considered.
4. A significant number of documents have been filed with the Notice of Objection.
 5. The Notice notes that the Objector does not fall within the class of persons who may object as set out in PD 2.3.1 (a) and (b). The Objector is not the Fishery Client and nor was it a party to the assessment process that made written submissions to the CAB during the assessment process nor did it attend any stakeholder meetings, in person or remotely.
 6. The Trust, however, submits that it is a valid objector on the basis of PD 2.3.1 (c), namely that it falls within the class of persons described as “*Any other party that can establish that the failure of the CAB to follow procedures prevented or substantially impaired the party’s participation in the assessment process.*” The Trust has made a number of detailed submissions set out in the Notice which can be summarised as follows:
 - a. The Trust “is a leading environmental charity non-profit organisation[its] official website www.sharkattachcampaign.co.za is a definitive go-to platform for all matters relating to South African sharks and rays.” It is said the Trust was established in 2005 and operates two programmes WILDLANDS and WILDOCEANS and raised South African Rand 170 million for conservation efforts in around 20 communities in South Africa and has worked in Mozambique, Tanzania and Comoros.
 - b. One of the key features of the Trust’s work is the protection of South Africa’s Sharks and Rays and since October 2019 it has coordinated a National Shark Forum. The Trust states it has engaged with the MSC for around two years. In particular an email

is included from Mr. Michael Marriot of the MSC who wrote on 9 May 2019 to Dr Jean Harris at the Trust: *“It would also be good to get an overview of your work in this area and ensure that WILDTRUST is engaged in MSC consultation processes going forward.”*

- c. The Trust heard about the Fishery’s assessment process only on 18 November 2020 and they received no correspondence from the CAB in respect of the assessment process generally or the stakeholder involvement specifically.
 - d. Further the Objector points to FCP G.4.2 where it is said CABs are: “required to actively seek to identify all potential stakeholders in a fishery” Reference is also made to FCP G.7.12.3.1 and the Objector also relies on the broad MSC definition of a ‘stakeholder’.
 - e. In short they submit the CAB “could and should have identified WILDTRUST as a stakeholder given its expertise in this area”.
7. It is important to record that as the allocated Independent Adjudicator I issued an earlier decision on 6 December 2020 in respect of an earlier Notice of Objection, dated 19 November 2020, related to this Fishery and in respect of the same parties. I observed in that decision:

“I have carefully considered whether this information is sufficient to permit the Trust to be an objector. I am satisfied that it is not for the following reasons:

- i. PD 2.3.1.c requires identification of a procedure that the CAB has failed to follow.*
- ii. The information provided neither identifies the “procedure” nor a failure on the part of the CAB.*
- iii. A complaint about the MSC action or inaction is not sufficient.*
- iv. The CAB’s report evidences ample consultation and the Notice fails to engage with the CAB’s report and explain how or why the trust was disadvantaged.*

I conclude therefore that on the information presented the Trust is not within the class of persons permitted by the MSC’s scheme to object. The objection is therefore invalid and must be dismissed.”

8. As a result, I further observed that:

As the Trust may raise issues regarding the purported failure by the CAB to consult them as a stakeholder, I have determined that the CAB's response to this issue should be provided, should an amended Notice be filed and served. I acknowledge that PD 2.4 does not expressly cater for this, however, it is obvious that fairness demands that I permit the CAB to respond to an allegation made of this nature. Without such assistance from the CAB, I cannot see how any dispute or argument (if there is any) in respect of PD 2.3.1 could be fairly resolved.

9. I dismissed that Objection.

10. As is apparent, and as the Objector was entitled to do it, it filed and served a further Notice of Objection (which I have summarised above). Helpfully, the CAB have responded in accordance with the earlier 6 December 2020 decision. A written submission with supporting documents was filed and served on 18 December 2020. In short, the CAB accepts the Trust was not consulted. In summary, the CAB submits:

- a. Lloyd's Register takes stakeholder engagement "very seriously as it is a crucial part of the assessment process".
- b. The CAB conducted a search of all relevant NGOs that may be interested in the assessment and contacted the harmonised Namibian Hake trawl and longline fishery and notified all their stakeholders.
- c. Representatives of the MSC were involved in site visits in Cape Town in October 2019 but did not bring the Trust's potential stakeholder involvement to the CAB's attention.
- d. A lengthy list of stakeholders to the Fishery assessment was provided with the CAB's response.

11. I have reviewed the CAB's Fishery assessment report. At page 212 and following, in section 8.2.1, the report's authors set out details of a site visit which took place in Cape Town in the week of 28 October 2019. The report sets out a list of 13 individuals and organisations that the assessment team met with in the run up to the site visit. Sections 8.2.2 and 8.2.3 survey the further stakeholder organisations involved in the consultation process. The CAB state 43 organisations were identified and notified of the surveillance process.

12. Furthermore the report states the consultation went wider as: “In addition, the interest of others not appearing on this list was solicited through the postings on the MSC website and Control Union UK notified the Namibian Hake stakeholders of the site visit details.”
13. The CAB have set out a record of the meetings and consultations with various stakeholders in the report, including from amongst others, WWF, SAEON and Birdlife.
14. First, I must consider whether or not the Trust can establish they fall within PD 2.3.1. This limits the class of parties who may object to *inter alia*: the fishery client; or a stakeholder who attended stakeholder meetings or made written submissions during the assessment process.
15. It appears to be common ground the Trust did not take part in any way with the Fishery assessment process.
16. PD 2.3.1.c states:

“Any other party that can establish that the failure of the CAB to follow procedures prevented or substantially impaired the party’s participation in the assessment process.”
17. The Trust make a convincing case that they should have been identified as a stakeholder and in fairness to the CAB, their submissions implicitly recognises this. I find that the Trust is a relevant stakeholder for the purposes of the assessment of a South African fishery which may impact on sharks and rays. That is because of the evidence of the extensive conservation work it carries out in these areas. The MSC were aware of this.
18. If a narrow interpretation of PD 2.3.1.c were to be adopted it would be possible to conclude that the CAB correctly sought to identify and did identify relevant stakeholders and therefore there was no failure to follow procedures. A broader interpretation would lead to the conclusion that a stakeholder consultation which failed to identify this Objector was insufficient because plainly they do play a role on the conservation of fish around South African waters. After careful consideration and, on balance, I adopt a broader interpretation of PD 2.3.1.c because that is consistent with the MSC emphasis on transparency,

accountability and broad stakeholder input. It may seem somewhat harsh to conclude that a diligent and comprehensive stakeholder consultation, that clearly reached out to many relevant stakeholders, amounts to a failure to follow a procedure, but it seems clear the CAB accepts that if they had known about the Objector's role, they would have included them in the stakeholder consultation. On balance I conclude there was an inadvertent failure and this led to the Objector being prevented from playing its role as a relevant stakeholder.

19. Therefore, pursuant to PD 2.3.1 the Objector is within the class of persons who may be considered a party permitted by Annex PD to validly file a Notice of Objection.
20. I turn now to consider the test set out at PD 2.4.1. FCR PD 2.3 sets out the requirements to determine the essential validity of a Notice of Objection and FCR PD 2.4.1 requires the IA, in his/her discretion, to be satisfied that the Notice of Objection submitted meets the mandatory requirements of PD 2.3. I am satisfied that all the essential requirements are met.
21. Turning to the second substantive issue, FCR PD 2.4.1 requires the IA, in his/her discretion, to be satisfied that the Notice of Objection submitted has reasonable prospects of success. This is defined at PD 2.4.2. As I read this section of the FCR both PD 2.4.2.1 and 2.4.2.2 are required to be satisfied.
22. Ground 1 submits the CAB made a serious procedural error by not identifying the Objector as a stakeholder and it is said that this has significantly affected the CAB's determination because there has not been proper consideration of the bycatch of chondrichthyans and their mortality which has impacted on scoring and conditions such as the Fishery Client funding research and the use of independent observers.
23. This ground of objection is, in my judgement, spurious (not valid). It is not properly arguable that the failure to identify the Objector as a stakeholder is a serious procedural objection which was material to the fairness of the assessment. This must follow from the nature of the nuanced decision (set out above) that on balance the CAB failed to follow procedure when it did not identify the Trust as a stakeholder, but this does not get close to amounting to the higher test of 'serious procedural irregularity which was material to the assessment'. The experienced CAB has produced a detailed and thorough professional report assessing much

evidence and information of this Fishery against the MSC standard. It is invalid to suggest the failure to identify the Objector as a stakeholder, alone, has led to a material impact on the assessment. I dismiss this ground for these reasons.

24. I consider next the 3 challenges to the conditions imposed pursuant to PD 2.8.2 (b) and the 8 scoring challenges pursuant to PD 2.8.2 (c). These challenges all seek to impugn scoring and conditions related to ‘endangered, threatened, protected’ (“ETP”) species and in particular chondrichthyans and more specifically sharks and are overarchingly related to primary and or secondary species management which is highly related to ETPs. A vast amount of information has been provided by the Objector to support its grounds of objection. An Independent Adjudicator without the assistance of the parties, and the CAB, in particular, cannot be expected to resolve scientific and statistical information of this complexity as seen against the lengthy CAB report. I am not able to determine that the grounds of objection have no reasonable prospect of success. The points made relate to important conservation issues related to vulnerable species such as Soupfin sharks. At this stage, I cannot determine that these grounds are spurious or vexatious and I am satisfied from my reading that the information provided in support of these grounds, may give some reason to expect that PD 2.8.2 requirements are satisfied. Ultimately, when I have heard from the CAB and the Fishery Client it may well be the issues around primary/secondary and ETP species amount to no more than reasonable scientific judgement calls and I will be required by the scheme to provide due deference to the CAB’s determination, given the limited and supervisory nature of the Independent Adjudicator’s role.

25. For these reasons the eleven grounds of objection related to conditions and scoring pursuant to PD 2.8.2 (b) and (c) are accepted.

26. Lastly, I dismiss the final ground of objection pursuant to PD 2.8.3. First, the CAB plainly did consider the first of the 4 documents identified in the Notice of Objection, therefore it is spurious to suggest it is necessary to remand the CAB’s determination to consider documents it has already considered in its report. I reject as unfounded the Objector’s suggestion the CAB mentioned them but misinterpreted or misunderstood the publications. The test at PD 2.7.5 (b) makes clear the reference is to documents the CAB could have considered but did not.

The CAB did consider these documents. The test is plainly not met. In as much as the Objector has a legitimate argument about the effects of the information, it may be able to pursue the same or similar points pursuant to its scoring and conditions grounds of objection, which have been permitted (see above).

27. The Objector has identified a further 5 documents it says “have not been considered at all”. I am not prepared to accept it is necessary for the determination to be remanded separately from the issues raised in the eleven grounds above. Nor am I satisfied that an experienced CAB having considered a considerable amount of information, which is recorded in the report, after extensive consultation, requires yet further information outside of the consideration of that which will be required in the Objection adjudication (if party consultation/mediation fails) on the eleven grounds above. It is for these reasons spurious to require an additional ground.
28. For these reasons, pursuant to PD 2.4.1, I dismiss two grounds of objection. Eleven grounds of objection are accepted for the reasons provided above.
29. I fully expected the parties to liaise and enter into a meaningful dialogue over the next 15 days to reduce any disagreement, particularly in the circumstances where this CAB and this Objector have not had the opportunity to engage on this Fishery. I will be involved in this process, see below.

Order

1. The two grounds of objection pursuant to PD 2.8.2 (a) and PD 2.8.3 are hereby dismissed.
2. The eleven grounds of objection pursuant to PD 2.8.2 (b) and (c) are accepted.
3. The Objector, the CAB and the Fishery Client have fifteen days from publication of this decision, namely until 28 January 2021, to consult pursuant to PD 2.5.
4. Forthwith, the CAB shall liaise with the parties to identify available dates for a one hour virtual meeting between the parties and the IA (which shall take place in the week of 18 January 2021, for the purpose of determining the state of the consultation between the parties) and report in writing to the IA with proposed times and dates by 13 January 2021, copying in all parties’ representatives.

John McKendrick QC
Independent Adjudicator

7 January 2021